



ATTORNEY GENERAL OF TEXAS  
GREG ABBOTT

February 23, 2004

Mr. Ken Johnson  
Assistant City Attorney  
City of Waco - Legal Services  
P.O. Box 2570  
Waco, Texas 76702-2570

OR2004-1314

Dear Mr. Johnson:

You ask whether certain information is subject to required public disclosure under chapter 552 of the Government Code. Your request was assigned ID# 196432.

The Waco Police Department (the "department") received a request for the personnel file of a named police officer, information relating to the officer's duty assignments during his employment with the department, and information relating to three specified cases. You state that some responsive information has been released to the requestor. You claim that the remainder of the information at issue is excepted from disclosure under sections 552.101, 552.108, 552.115, 552.117, 552.119, 552.122, and 552.130 of the Government Code. We have considered the exceptions you claim and reviewed the submitted information.

As a preliminary matter, you state that, because the department does not maintain a listing of the officer's duty assignments, the department cannot provide information responsive to this portion of the request. The Public Information Act (the "Act") generally does not require a governmental body to obtain information not in its possession, or create new information, in response to a request. *See* Open Records Decision Nos. 599 (1992), 534 (1989); *see also Economic Opportunities Dev. Corp. v. Bustamante*, 562 S.W.2d 266 (Tex.Civ.App.—San Antonio 1978, writ dismissed) (Act does not require governmental body to disclose information that did not exist at the time request was received). However, a governmental body must make a good faith effort to relate a request under the Act to information in the governmental body's possession. Open Records Decision No. 561 (1990). You do not contend that the requested duty assignment information is excepted from required public disclosure under the Act. Thus, to the extent the department maintains information responsive to the request for the officer's duty assignments in records that existed at the time the department received the present request, the department must release such information to the requestor.

We next address the information you have submitted as Exhibits 10 and 12, relating to three specified cases investigated by the department.<sup>1</sup> You claim that this information is excepted from disclosure under section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. Section 552.101 excepts from disclosure "information considered to be confidential by law, either constitutional, statutory, or by judicial decision," and encompasses information protected by other statutes. Section 261.201(a) of the Family Code provides as follows:

(a) The following information is confidential, is not subject to public release under Chapter 552, Government Code, and may be disclosed only for purposes consistent with this code and applicable federal or state law or under rules adopted by an investigating agency:

(1) a report of alleged or suspected abuse or neglect made under this chapter and the identity of the person making the report; and

(2) except as otherwise provided in this section, the files, reports, records, communications, audiotapes, videotapes, and working papers used or developed in an investigation under this chapter or in providing services as a result of an investigation.

Fam. Code § 261.201. The information in Exhibits 10 and 12 was used or developed in investigations conducted under chapter 261. Thus, we find that this information is within the scope of section 261.201 of the Family Code. You have not indicated that the department has adopted a rule that governs the release of this type of information. Therefore, we assume that no such regulation exists. Given that assumption, the information in Exhibits 10 and 12 is confidential pursuant to section 261.201 of the Family Code. *See* Open Records Decision No. 440 at 2 (1986) (predecessor statute). Accordingly, the department must withhold the information in Exhibits 10 and 12 from disclosure in its entirety under section 552.101 of the Government Code as information made confidential by law.

We next address your claimed exceptions for the submitted personnel information. Section 143.089 of the Local Government Code provides in pertinent part:

(a) The director [of the fire fighters' or police officers' civil service] or the director's designee shall maintain a personnel file on each fire fighter and police officer. The personnel file must contain any letter, memorandum, or document relating to:

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<sup>1</sup> You inform us that two of the cases at issue were later combined under a single case number.

(2) any misconduct by the fire fighter or police officer if the letter, memorandum, or document is from the employing department and if the misconduct resulted in disciplinary action by the employing department in accordance with this chapter . . .

...

(g) A fire or police department may maintain a personnel file on a fire fighter or police officer employed by the department for the department's use, but the department may not release any information contained in the department file to any agency or person requesting information relating to a fire fighter or police officer. The department shall refer to the director or the director's designee a person or agency that requests information that is maintained in the fire fighter's or police officer's personnel file.

You state that the city is a civil service city under chapter 143 of the Local Government Code. Section 143.089 of the Local Government Code provides for the creation of two personnel files for police officers and fire fighters: one that must be maintained by the city's civil service director or his designee and another that may be maintained by the city's fire and police departments. Local Gov't Code § 143.089(a), (g). In cases in which a police department investigates a police officer's misconduct and takes disciplinary action against an officer, it is required by section 143.089(a)(2) to place all investigatory records relating to the investigation and disciplinary action, including background documents such as complaints, witness statements, and documents of like nature from individuals who were not in a supervisory capacity, in the police officer's civil service file maintained under section 143.089(a).<sup>2</sup> *Abbott v. City of Corpus Christi*, 109 S.W.3d 113, 122 (Tex. App.—Austin 2003, no pet.). All investigatory materials in a case resulting in disciplinary action are “from the employing department” when they are held by or in possession of the department because of its investigation into a police officer's misconduct, and the department must forward them to the civil service commission for placement in the civil service personnel file. *Id.* Such records are subject to release under chapter 552 of the Government Code. *See* Local Gov't Code § 143.089(f); Open Records Decision No. 562 at 6 (1990). However, a document relating to a police officer or fire fighter's alleged misconduct may not be placed in his civil service personnel file if there is insufficient evidence to sustain the charge of misconduct. Local Gov't Code § 143.089(b). Information that reasonably relates to a police officer or fire fighter's employment relationship with the department and that is maintained in a department's internal file pursuant to section 143.089(g) is confidential and must not be released. *City of San Antonio v. San Antonio Express-News*, 47 S.W.3d 556 (Tex. App.—San Antonio 2000, pet. denied); *City of San Antonio v. Texas Attorney General*, 851 S.W.2d 946, 949 (Tex. App.—Austin 1993, writ denied).

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<sup>2</sup>Chapter 143 prescribes the following types of disciplinary actions: removal, suspension, demotion, and uncompensated duty. *See id.* §§ 143.051-.055.

You state portions of the submitted information are contained in the department's internal personnel file for the officer at issue. We agree that the portions of the information at issue that are contained in the department's internal file are confidential under section 143.089(g) of the Local Government Code and must be withheld pursuant to section 552.101 of the Government Code. With respect to the information submitted as Exhibit 4, you state that the information consists of information from the City of Waco's personnel file and will be released to the requestor. However, you also contend that the information in Exhibit 4 is confidential under section 143.089(g) because it is maintained in the department's internal file on the officer at issue. Thus, we determine that to the extent the information in Exhibit 4 is maintained in the department's internal file, it is confidential under section 143.089(g). However, in the event the information in Exhibit 4 is not contained in the internal file, we will address the applicability of your other claimed exceptions for this information and the remainder of the submitted information.

The department contends that portions of the remaining information at issue are excepted from disclosure under section 552.101 in conjunction with the doctrine of common-law privacy. Common-law privacy protects information if (1) the information contains highly intimate or embarrassing facts, the publication of which would be highly objectionable to a reasonable person, and (2) the information is not of legitimate concern to the public. *Industrial Found. v. Texas Indus. Accident Bd.*, 540 S.W.2d 668, 685 (Tex. 1976), *cert. denied*, 430 U.S. 931 (1977).

The type of information considered intimate and embarrassing by the Texas Supreme Court in *Industrial Foundation* included information relating to sexual assault, pregnancy, mental or physical abuse in the workplace, illegitimate children, psychiatric treatment of mental disorders, attempted suicide, and injuries to sexual organs. 540 S.W.2d at 683. In addition, this office has found that the following types of information are excepted from required public disclosure under common-law privacy: an individual's criminal history when compiled by a governmental body, *see* Open Records Decision No. 565 (*citing United States Dep't of Justice v. Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989)), personal financial information not relating to a financial transaction between an individual and a governmental body, *see* Open Records Decision Nos. 600 (1992), 545 (1990), some kinds of medical information or information indicating disabilities or specific illnesses, *see* Open Records Decision Nos. 470 (1987) (illness from severe emotional and job-related stress), 455 (1987) (prescription drugs, illnesses, operations, and physical handicaps), and identities of victims of sexual abuse, *see* Open Records Decision Nos. 440 (1986), 393 (1983), 339 (1982).

You have marked information in the remaining documents at issue that you contend is protected by common-law privacy. We agree that the remaining information contains some personal financial information pertaining to the officer that is protected by privacy. We have marked the information that the department must withhold pursuant to section 552.101 of the Government Code in conjunction with common-law privacy. However, we further find

that the remaining information you seek to withhold under common-law privacy is not highly intimate and embarrassing. Moreover, some of the information you seek to withhold under common-law privacy consists of payroll information that relates to a financial transaction between an individual and a governmental body and is therefore subject to a legitimate public interest. Accordingly, we find that the remaining information you seek to withhold pursuant to common-law privacy is not excepted from disclosure on that basis.

We note that the remaining information at issue contains information that is excepted from disclosure under section 552.117(a)(2) of the Government Code.<sup>3</sup> Section 552.117(a)(2) excepts from required public disclosure the home address, home telephone number, social security number, and the family member information of a peace officer as defined by article 2.12 of the Code of Criminal Procedure. *See* Open Records Decision No. 622 (1994). We have marked the information that the department must withhold under section 552.117(a)(2).

You also seek to withhold a photograph of the officer at issue pursuant to section 552.119 of the Government Code, which provides:

(a) A photograph that depicts a peace officer as defined by Article 2.12, Code of Criminal Procedure, or a security officer commissioned under Section 51.212, Education Code, the release of which would endanger the life or physical safety of the officer, is excepted from [required public disclosure] unless:

- (1) the officer is under indictment or charged with an offense by information;
- (2) the officer is a party in a fire or police civil service hearing or a case in arbitration; or
- (3) the photograph is introduced as evidence in a judicial proceeding.

(b) A photograph exempt from disclosure under Subsection (a) may be made public only if the peace officer or security officer gives written consent to the disclosure.

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<sup>3</sup> In your comments to this office, you note that this office has issued a previous determination ruling that information within the scope of section 552.117(a)(2) may be withheld without the necessity of requesting an attorney general decision. *See* Open Records Decision No. 670 (2001) (allowing a governmental body to withhold information within the scope of the statutory predecessor to section 552.117(a)(2) without the necessity of requesting an attorney general decision); *see also* Gov't Code § 552.301(a) (allowing a governmental body to withhold information that is subject to a previous determination). However, as you have submitted the information at issue for our review, we will address your claim under section 552.117(a)(2) and mark the submitted documents to indicate the information that is within the scope of that section.

Gov't Code § 552.119. In this instance, you have not demonstrated, nor is it apparent from our review of the submitted information, that release of the photograph at issue would endanger the life or physical safety of the officer. We therefore determine that the department may not withhold the photograph of the officer in the remaining submitted documents pursuant to section 552.119.

Finally, we note that the remaining information contains information that is excepted from disclosure under section 552.130 of the Government Code, which provides in pertinent part:

(a) Information is excepted from the requirements of Section 552.021 if the information relates to:

- (1) a motor vehicle operator's or driver's license or permit issued by an agency of this state; [or]
- (2) a motor vehicle title or registration issued by an agency of this state[.]

Gov't Code § 552.130. We have marked the information that the department must withhold under section 552.130 of the Government Code.

In summary, the department must withhold the information in Exhibits 10 and 12 in its entirety pursuant to section 552.101 of the Government Code in conjunction with section 261.201 of the Family Code. Information maintained in the department's internal personnel file pertaining to the officer at issue is confidential under section 143.089(g) of the Government Code and must be withheld under section 552.101. We have marked portions of the remaining submitted information that are excepted from disclosure under section 552.101 in conjunction with common-law privacy. We have also marked the portions of the remaining information that must be withheld under sections 552.117(a)(2) and 552.130 of the Government Code. Based on these findings, we need not reach your other claimed exceptions for the submitted information. The remainder of the information at issue must be released to the requestor.

This letter ruling is limited to the particular records at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other records or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For example, governmental bodies are prohibited from asking the attorney general to reconsider this ruling. Gov't Code § 552.301(f). If the governmental body wants to challenge this ruling, the governmental body must appeal by filing suit in Travis County within 30 calendar days. *Id.* § 552.324(b). In order to get the full benefit of such an appeal, the governmental body must file suit within 10 calendar days. *Id.*

§ 552.353(b)(3), (c). If the governmental body does not appeal this ruling and the governmental body does not comply with it, then both the requestor and the attorney general have the right to file suit against the governmental body to enforce this ruling. *Id.* § 552.321(a).

If this ruling requires the governmental body to release all or part of the requested information, the governmental body is responsible for taking the next step. Based on the statute, the attorney general expects that, within 10 calendar days of this ruling, the governmental body will do one of the following three things: 1) release the public records; 2) notify the requestor of the exact day, time, and place that copies of the records will be provided or that the records can be inspected; or 3) notify the requestor of the governmental body's intent to challenge this letter ruling in court. If the governmental body fails to do one of these three things within 10 calendar days of this ruling, then the requestor should report that failure to the attorney general's Open Government Hotline, toll free, at (877) 673-6839. The requestor may also file a complaint with the district or county attorney. *Id.* § 552.3215(e).

If this ruling requires or permits the governmental body to withhold all or some of the requested information, the requestor can appeal that decision by suing the governmental body. *Id.* § 552.321(a); *Texas Dep't of Pub. Safety v. Gilbreath*, 842 S.W.2d 408, 411 (Tex. App.—Austin 1992, no writ).

Please remember that under the Act the release of information triggers certain procedures for costs and charges to the requestor. If records are released in compliance with this ruling, be sure that all charges for the information are at or below the legal amounts. Questions or complaints about over-charging must be directed to Hadassah Schloss at the Texas Building and Procurement Commission at (512) 475-2497.

If the governmental body, the requestor, or any other person has questions or comments about this ruling, they may contact our office. We note that a third party may challenge this ruling by filing suit seeking to withhold information from a requestor. Gov't Code § 552.325. Although there is no statutory deadline for contacting us, the attorney general prefers to receive any comments within 10 calendar days of the date of this ruling.

Sincerely,



David R. Saldivar  
Assistant Attorney General  
Open Records Division

DRS/seg

Ref: ID# 196432

Enc: Submitted documents

c: Ms. Cindy Culp  
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(w/o enclosures)